



Solidarity & Afriforum v Minister of Health and 16 Others

Vaccine procurement case

February to March 2021

WHAT WAS THIS CASE ABOUT?

Vaccine Access - and the role of the state and others in the private sector, provinces and medical schemes in procurement, and in turn selection and allocation based on financial means.

During January 2021, the Minister of Health announced the details of South Africa's COVID-19 Vaccine Roll-out Strategy. It provides that the "South African government will be the sole purchaser of vaccines for the country" and that various government-appointed structures will oversee the allocation and roll-out of the vaccines.

Solidarity and Afriforum (the Applicants) challenged the government's strategy and asked the court to remove any restrictions so that the private sector, medical schemes, other institutions and provincial governments could 'buy, distribute or administer vaccines independently from the national government'.

On 2 March 2021, the Applicants withdrew the matter.



WHO IS THE HEALTH JUSTICE INITIATIVE?

The HJI is a not-for-profit organisation that focuses on public health and law. It addresses the intersection between racial and gender inequality with an emphasis on access to life-saving diagnostics, treatment, and vaccines for COVID-19, TB and HIV.



FRIEND OF THE COURT (AMICUS CURIAE)

An amicus curiae is the Latin phrase for "Friend of the Court".

It is an individual or an organisation that applies to a court to bring additional perspectives or evidence to a case, to help the judges with additional insights into the issue that they must decide, which could lead to more nuanced decision-making. The amicus is not a formal party in a case.

WHY WAS HJI SEEKING TO BE A FRIEND OF THE COURT IN THIS CASE?

Several factors underpinned HJI's intervention:

- South Africa's highly unequal dual health care system where medical schemes cover a small portion of our people
- The relevant human rights and equity considerations in this pandemic
- The current global shortage of enough supplies of safe and effective vaccines
- The impact of a mutating virus on vaccine acquisition, selection, and allocation
- The danger that vaccine nationalism which is already promoting irrational and unfair 'queue jumping' globally, will materialise here too, unless addressed now
- Global best practice rooted in public health and scientific consensus, including UN and WHO recommendations and warnings
- The epidemiological and public health need for prioritisation based on health risk, not financial means or scheme membership.



EQUITY

The case raised important questions about how the court would address the public health and also the human rights consequences if non-state actors and/or provincial governments are also authorised to procure vaccines, without oversight and overall management by national government and outside of a national strategy that prioritised health risk, not financial means.



WHAT WERE HJI'S MAIN ARGUMENTS?

HJI made three main arguments:

1. Vaccines should be treated as a Public Good not a commodity in a pandemic.

Vaccines should be regarded as a public good. The allocation of vaccines must also be done in a fair and equitable manner, starting with those people who are most at risk of severe illness and death.

2. Follow international examples.

Policies from other countries support an approach of governments leading vaccine price negotiations, procurement and allocation through national strategies rooted in evidence and science. They also promote partnering with others to ensure the speedy and effective administration of vaccines to achieve widespread immunity through rational, transparent and fair prioritisation frameworks.

3. Avoid harmful rights implications.

Should the private sector including medical schemes and/or provincial governments, in parallel to the national government, procure vaccines without oversight and management, this will have dire implications for the right to access to healthcare, life, and dignity, and on the ability of the state to ensure equity in allocation and distribution of COVID-19 vaccines, harming the most vulnerable of our population.

WHAT LAWS WERE THE FOCUS OF THE COURTCASE?

Solidarity and Afriforum argued that curtailing the private sector from procuring, distributing and administering vaccines violates section 7(1) of the Constitution that includes human dignity, equality and freedom. And that Government's vaccine strategy inter alia infringes on Section 22 of the Constitution that relates to freedom of trade, occupation and profession, Section 27(1) that relates to the rights of access to health care.

HJI argued that where there is a scarcity of vaccines as there is currently during the COVID-19 pandemic, national government is justified to restrict direct procurement by the private sector or provincial governments without oversight and management by the national government. This would not be a violation or unjustifiable limitation to the right of access to health care (section 27 of the Constitution).

HJI'S SUBMISSION

Experts are needed to guide the court:

HJI argued that the court cannot make a decision on such a far reaching case without the benefit of expert evidence dealing with inequity, public health principles and international approaches.

Potential for harm

Procuring and allocating vaccines independently in this pandemic, at this time, and outside of national processes and guidelines, could result in a lack of coordination, poor accountability and an inability to ensure equity in access to vaccines. Such an approach is also not supported by the large body of technical, scientific, and ethical guidance presently available in the public domain.

Unequal health care system – privileged access cannot be supported in a pandemic

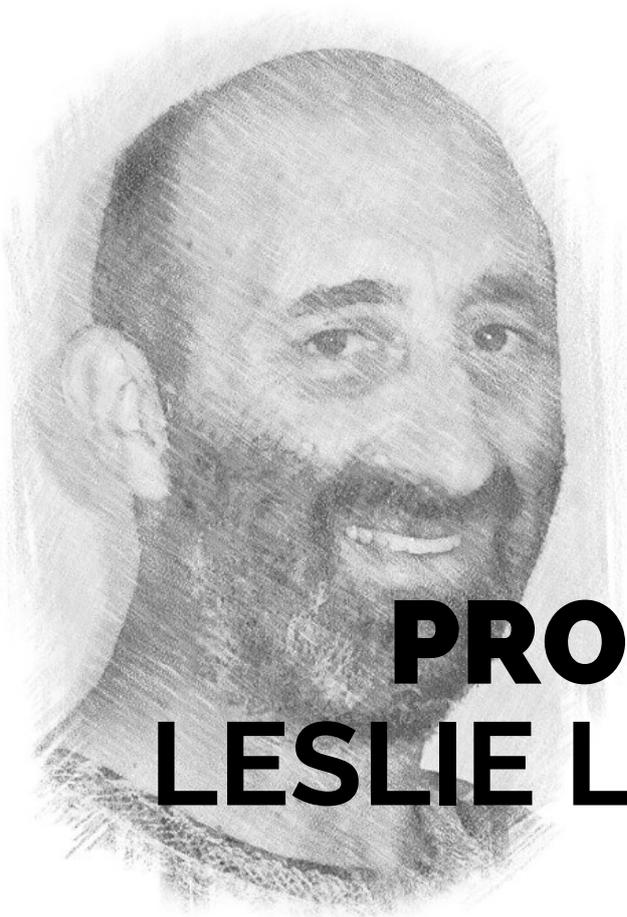
The huge divide between public and private health care sectors, which characterises South Africa's current divided health system, results in significant resources being inefficiently sequestered in the private sector. Inequity arises because the private sector will service those who pay, be they members of a medical scheme or wealthier individuals but will not reach people in need who cannot afford private health care – the majority of people living in".

WHO WERE THE EXPERTS THAT HJI RELIED ON?

- Professor Leslie London is a professor and public health specialist at the School of Public Health and Family Medicine, UCT, and a member of the People's Health Movement.
- Dr Tlaleng Mofokeng is a medical doctor and the United Nations (UN) Special Rapporteur on the right to physical and mental health.
- Prof Saad Bin Omer is an epidemiologist and professor at the Yale Institute for Global Health, Yale University, USA.



WHAT DID HJI'S EXPERT AFFIDAVITS MENTION?



PROFESSOR LESLIE LONDON

“Vaccines for COVID-19 are not just any ordinary commodity that can be purchased by someone with the resources to do so. They are, as UN Secretary-General António Guterres articulated, “a global public good, affordable and available to all.”

There is an absolute shortage of vaccine supplies globally. In this context, rationing based on public health evidence, data, need and the input of public health and scientific experts will be necessary at least at the early stage of the epidemic.

“By promoting a vaccine programme that vaccinates on the basis of first-come, first-served, the applicants’ proposed programme will fail to “protect and promote human well-being including health, social and economic security, human rights...”



If provinces and private groups select, procure, allocate and distribute vaccines independently and outside of national processes and guidelines, it will be at the cost of the health and survival of high-risk and vulnerable groups in our country. Such an approach is not supported by best practice globally, at present.

“It is generally accepted public health practice to focus on those at high risk who can benefit maximally from vaccination. If one vaccinates fit and healthy adults or young people, who are low risk, even if one does reach high numbers, then one is doing so at the expense of individuals who have immediate health risk-based needs and who should be vaccinated first, on public health grounds.

DOCTOR TLALENG MOFOKENG



Various international treaties and legal instruments confirm that governments have an obligation to realise the right to access health care, that vaccines should be regarded as a “public good” and that vaccines should be made available in an equitable way.

“given the well-known shortage of supply of vaccine, vaccine acquisition and allocation by the private sector without national oversight and co-ordination would be contrary to international human rights guidelines and vaccine equity. It would harm South Africans who do not have access to private medical resources.”

“...without co-ordination there is also a risk that prices of potential vaccines will be higher in some sectors and the private sector in particular.”